

SUPREME COURT NO. SC84872

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IN THE SUPREME COURT OF MISSOURI

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ROBERT LESAGE,

Plaintiff/Appellant

vs.

DIRT CHEAP CIGARETTES AND BEER, INC.

Defendant/Respondent

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APPEAL FROM THE CIRCUIT COURT OF  
THE CITY OF ST. LOUIS, MISSOURI  
TWENTY-SECOND JUDICIAL COURT  
DIVISION 1

Honorable Margaret M. Neill  
Circuit Judge

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SUBSTITUTE BRIEF OF APPELLANT

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THE S.E. FARRIS LAW FIRM

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## **JURISDICTIONAL STATEMENT**

Dillon LeSage's mother and Robert LeSage's fiancé, Brandi Roussin, was shot and killed while working for Defendant. Dillon died with his mother. Robert LeSage filed suit in the 22<sup>nd</sup> Judicial Circuit (St. Louis City) for the wrongful death of Dillon. In the same action, Mr. LeSage sought to have his paternity determined because there was no presumption of paternity under Missouri law.

The Honorable Judge Mararet M. Neill held that because Mr. LeSage's son died prior to the bringing of an action to establish paternity, Mr. LeSage could never be declared Dillon's father. On Defendant's motion, the Honorable Judge Margaret M. Neill dismissed Robert LeSage's case with prejudice finding that

without proof of paternity, Robert had no standing to proceed in the wrongful death case.

Robert LeSage appealed the dismissal to the Missouri Court of Appeals, Eastern District. The Eastern District transferred to this Court in its opinion handed down October 15, 2002 pursuant to Missouri Rule of Civil Procedure 83.02, citing the general interest and importance of the issue of whether a putative father of a deceased unborn child may pursue an action under the Wrongful Death Act and specifically in light of the language of this Court in Connor v. Monkem Co., 898 S.W.2d 89 (Mo. *banc* 1995). This Court has jurisdiction pursuant to Article V, Section 10 of the Missouri Constitution.

## **STATEMENT OF FACTS**

On October 29, 2000, Brandi Roussin was shot and killed while working for Defendant. At the time of her death, Ms. Roussin was pregnant with Dillon, the child of her fiancé, Robert LeSage. Dillon died with his mother. Because Brandi died approximately three (3) weeks before she and Robert were to be married, there was no legal presumption of Robert's paternity of Dillon.

Robert filed his claim for the wrongful death of Dillon. Because he can only proceed on the wrongful death action if he is Dillon's father and there was no legal presumption of paternity, Robert sought a Determination of Paternity under the Missouri Uniform Parentage Act (UPA). (L.F. at 16, App. Ex. 2). While Defendant acknowledged that it had no standing to contest paternity, it opposed the Petition for Determination of Paternity. (L.F. at 28).

*Sua sponte*, the trial court determined that it could not declare paternity as all parties, namely the deceased child, were not before the court. (L.F. at 34). Section 210.830 of the UPA states that the child for whom a determination of paternity is sought "shall" be made a party to the action seeking the determination. MO. REV. STAT. § 210.830 (1987). Because Dillon died with his mother, it is impossible for him to be a party to any action. The trial court determined that Dillon's joinder as a party was a jurisdictional requirement, his absence a jurisdictional defect, and dismissed without prejudice the Petition for Determination of Paternity. (L.F. at 37).

Robert LeSage filed a second Petition for Determination of Paternity. (L.F. at 38, App. Ex. 4). Attempting to cure the perceived jurisdictional defect, Robert sought to have a Next Friend, or in the alternative Plaintiff/Petitioner *ad Litem* appointed to represent Dillon for this determination. (L.F. at 56). Defendant filed a Motion to Dismiss the wrongful death suit for lack of standing in response. (L.F. at 58, App. Ex. 5).

After oral argument, the trial court denied the request for appointment of Plaintiff/Petitioner *ad Litem*, did not address LeSage's request for appointment of a Next Friend and again denied the Petition for Determination of Paternity, ruling that the child was a required party not before the court. The trial court treated Defendant's Motion to Dismiss the wrongful death case for lack of standing as one for summary judgment, and granted it. The trial court reasoned that since Dillon had been murdered with his mother, he could never be joined as a party in a paternity hearing, and without meeting this jurisdictional requirement, Robert could never establish his paternity and therefore standing to sue for Dillon's death. (L.F. at 59, App. Ex. 6).

After unsuccessful Petitions for Writ of Mandamus, LeSage appealed to the Missouri Court of Appeals, Eastern District. That court transferred this matter to the Missouri Supreme Court.

## **POINTS RELIED ON**

### **I.**

**THE TRIAL COURT ERRED IN REFUSING TO CONSIDER ROBERT LESAGE'S EVIDENCE OF HIS PATERNITY OF DILLON LESAGE AND REFUSING TO HEAR SUBSTANTIVE EVIDENCE OF HIS STANDING TO PROCEED IN HIS ACTION FOR THE WRONGFUL DEATH OF DILLON. DISMISSAL OF ROBERT'S WRONGFUL DEATH CLAIM THEREAFTER WAS ERR, BECAUSE THE PROVISION OF THE UNIFORM PARENTAGE ACT THAT A CHILD "SHALL" BE MADE A PARTY DOES NOT PROSCRIBE A RESULT IF THE CHILD IS NOT MADE PARTY, THEREFORE THE LANGAUAGE OF THE STATUTE IS PERMISSIVE, NOT MANDATORY AND IT WAS ERR NOT TO PROCEED WITH A DETERMINATION OF PATERNITY; THE TRIAL COURT FURTHER FAILED TO ENGAGE IN THE ANALYSIS REQUIRED BY RULE 52.04 TO DECIDE WHETHER PATERNITY COULD BE DETERMINED IN THE ABSENCE OF DILLON LESAGE AND THIS ANALYSIS IS REQUIRED WHETHER JOINDER OF THE CHILD IS MANDATORY OR PERMISSIVE UNDER THE UNIFORM PARENTAGE ACT. THE TRIAL COURT'S DETERMINATION OF THE PATERNITY ISSUE LED TO THE IMPROVIDENT DISMISSAL OF LESAGE'S CASE FOR THE WRONGFUL DEATH OF HIS SON.**

Cobb v. State Security Insurance, 576 S.W.2d 726 (Mo. *banc* 1979)

Conner v. Monkem Co., 898 S.W.2d 89 (Mo. *banc* 1995)

Farmers & Merchants Bank & Trust Co. v. Director of Revenue, 896 S.W.2d 30  
(Mo. *banc* 1995)

Feinstein v. Feinstein, 778 S.W.2d 253 (Mo. App. 1989)

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Kingsley v. Burack, 536 S.W. 2d 7 (Mo. *banc* 1976)

Mello v. Williams, 73 S.W.3d 681 (Mo. App. 2002)

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MO. REV. STAT. § 210.830 (1987)

MO. REV. STAT. § 537.080 (1986)

Missouri Rule of Civil Procedure 52.04



## II.

**THE TRIAL COURT VIOLATED ROBERT LESAGE'S RIGHT TO EQUAL PROTECTION AS GUARANTEED BY THE UNITED STATES AND MISSOURI CONSTITUTIONS WHEN IT DENIED MR. LESAGE'S PETITION FOR DETERMINATION OF PATERNITY OF HIS UNBORN CHILD AND SUBSEQUENTLY DISMISSED WITH PREJUDICE MR. LESAGE'S PETITION FOR THE WRONGFUL DEATH OF HIS UNBORN CHILD, FINDING THAT MR. LESAGE LACKED STANDING TO PROCEED UNDER THE MISSOURI WRONGFUL DEATH STATUTE. THIS RESULT TREATS UNWED FATHERS DIFFERENTLY THAN UNWED MOTHERS IN A MANNER PROHIBITED BY THE CONSTITUTIONS OF MISSOURI AND THE UNITED STATES.**

Callier v. Director of Revenue, 780 S.W.2d 639 (Mo. 1989)

Cobb v. State Security Insurance, 576 S.W.2d 726 (Mo. *banc* 1979)

Conner v. Monkem Co., 898 S.W.2d 89 (Mo. *banc* 1995)

Glasco v. Fire and Cas. Ins. Co., 709 S.W.2d 550 (Mo. App. 1986)

Glonn v. American Guarantee & Liability Insurance Co., 391 U.S. 73 (1968)

Piel v. Piel, 973 S.W.2d 373 (Mo. App. 1996)

State ex rel Ford v. Wenskay, 824 S.W.2d 99 (Mo. App. 1992)

State ex rel York v. Daugherty, 969 S.W.2d 223 (Mo. 1998)

Wilcox v. Jones, 346 S.2d 1037 (Fla. App. 1977)

### III.

THE TRIAL COURT ERRED IN TREATING DEFENDANT'S MOTION TO DISMISS AS ONE FOR SUMMARY JUDGMENT AND GRANTING DEFENDANT'S MOTION TO DISMISS FOR LACK OF STANDING WHERE PLAINTIFF'S PETITION ALLEGED STANDING. THE TRIAL COURT ACKNOWLEDGED THAT IT RELIED ON FACTS OUTSIDE THE PETITION, THEREBY TREATING SUCH MOTION AS ONE FOR SUMMARY JUDGMENT, WITHOUT AFFORDING PLAINTIFF AN OPPORTUNITY TO RESPOND. FURTHER, THE TRIAL COURT'S DISMISSAL WITH PREJUDICE WAS OVERBROAD AND AN ABUSE OF DISCRETION IN THAT IT BARS ALL CAUSES OF ACTION FOR THE WRONGFUL DEATH OF DILLON LESAGE AGAINST DEFENDANT BY ALL PERSONS, CONTRARY TO THE CLEAR INTENT OF MO. REV. STAT. § 537.080, (THE WRONGFUL DEATH STATUTE). THE WRONGFUL DEATH STATUTE ALLOWS FOR SEVERAL CLASSES OF PLAINTIFF, BUT THE TRIAL COURT'S DETERMINATION THAT MR. LESAGE LACKED STANDING AND SUBSEQUENT DISMISSAL WITH PREJUDICE OF THE DEATH CASE WILL INSTEAD SERVE AS A COMPLETE BAR TO ALL SUITS AGAINST DEFENDANT FOR THE WRONGFUL DEATH OF DILLON LESAGE.

Arnold v. American Family Mutual Insurance Co., 978 S.W.2d 537 (Mo. App.

1999)

Manzer v. Sanchez, 985 S.W.2d 936 (Mo. App. 1999)

Murphey v. A.A. Mathews, 841 S.W.2d 671 (Mo. *banc* 1992)

Switzer v. Hart, 957 S.W.2d 512 (Mo. App. 1997)

MO. REV. STAT. § 537.080 (1986)

Missouri Rule of Civil Procedure 55.27

## **ARGUMENT**

### **I.**

**THE TRIAL COURT ERRED IN REFUSING TO CONSIDER ROBERT LESAGE'S EVIDENCE OF HIS PATERNITY OF DILLON LESAGE AND REFUSING TO HEAR SUBSTANTIVE EVIDENCE OF HIS STANDING TO PROCEED IN HIS ACTION FOR THE WRONGFUL DEATH OF DILLON. DISMISSAL OF ROBERT'S WRONGFUL DEATH CLAIM THEREAFTER WAS ERR, BECAUSE THE PROVISION OF THE UNIFORM PARENTAGE ACT THAT A CHILD "SHALL" BE MADE A PARTY DOES NOT PROSCRIBE A RESULT IF THE CHILD IS NOT MADE PARTY, THEREFORE THE LANGAUAGE OF THE STATUTE IS PERMISSIVE, NOT MANDATORY AND IT WAS ERR NOT TO PROCEED WITH A DETERMINATION OF PATERNITY; THE TRIAL COURT FURTHER FAILED TO ENGAGE IN THE ANALYSIS REQUIRED BY RULE 52.04 TO DECIDE WHETHER PATERNITY COULD BE DETERMINED IN THE ABSENCE OF DILLON LESAGE AND THIS ANALYSIS IS REQUIRED WHETHER JOINDER OF THE CHILD IS MANDATORY OR PERMISSIVE UNDER THE UNIFORM PARENTAGE ACT. THE TRIAL COURT'S DETERMINATION OF THE PATERNITY ISSUE LED TO THE IMPROVIDENT DISMISSAL OF LESAGE'S CASE FOR THE WRONGFUL DEATH OF HIS SON.**

Missouri recognizes a cause of action for wrongful death. MO. REV. STAT. § 537.080 (1986). The rights of a parent to bring suit for the wrongful death of a child vests in both parents without reference their marital status. Higgins v. Gosney, 435 S.W.2d 653 (Mo. 1969).

In Connor v. Monkem Co., 898 S.W.2d 89, 90 (Mo. *banc* 1995), this Court held that the unwed father of a nonviable fetus could bring an action for the death of his illegitimate child, but he must prove paternity. Connor did not require that paternity be established prior to the child's birth or death, implying the propriety of a posthumous determination of paternity.

While Connor stated that the unwed father of a nonviable fetus could sue for the wrongful death of the fetus, this Court was not asked and did not address **how** to establish paternity in such a situation. This matter of first impression is now before the Court. The trial court's ruling rendered this Court's holding in Connor meaningless whereas a correct application of the law would not only give effect to Connor, but would answer the question not addressed in Connor.

While the Uniformed Parentage Act sets forth the requirements for establishing paternity in some settings, MO. REV. STAT. § 210.830, *et seq.*, the trial court's interpretation of the UPA precludes exactly what this Court contemplated in Connor—a posthumous declaration of paternity. Dillon was murdered before Robert LeSage was entitled to the presumption of paternity which attaches after a child is born, MO. REV. STAT. § 210.822, and Robert must have his paternity declared by the court. In filing for a petition for determination

of paternity, the UPA provides:

**The child shall be made a party to any action commenced under sections 210.817 to 210.852.** If he is a minor, he may be represented by a next friend appointed for him for any such action. The child's mother or father or the division of child support enforcement or any person having physical or legal custody of the child may represent him as his next friend. A guardian *ad litem* shall be appointed for the child only if child abuse or neglect is alleged, or if the child is named as a defendant, or if the court determines that the interests of the child and his next friend are in conflict. The natural mother, each man presumed to be the father under § 210.822, and each man alleged to be the natural father, shall be made parties or, if not subject to the jurisdiction of the court, shall be given notice of the action in a manner prescribed by the court and an opportunity to be heard. The court may align the parties.

MO. REV. STAT. § 210.830.

The trial court refused to consider LeSage's evidence of paternity, either on his Petition for Determination of Paternity, or in response to Defendant's Motion to Dismiss, as Dillon was not a party to the Petition for Determination of Paternity, and the court was unwilling to reach the matter in his absence. (L.F. at 59). The trial court interpreted the language in § 210.830, that the child "shall" be made a party as disallowing a posthumous declaration of paternity because a deceased

child could never be made a party.

At first glance, the language of § 210.830 *may appear to be mandatory*. However, this Court has held that “Whether the statutory word “shall” is mandatory or directory is a function of context.... Where the legislature fails to include a sanction for failure to do that which “shall” be done, courts have said that “shall” is directory, not mandatory.” Farmers & Merchants Bank & Trust Co. v. Director of Revenue, 896 S.W.2d 30, 33 (Mo. *banc* 1995).

Omission of a sanction or other result is key to the analysis. The use of “shall” in a statute is merely directory where the statute requires that certain things be done but does not provide what results occur on failure to comply. Rundquist v. Director of Revenue, 62 S.W.3d 643 (Mo. App. 2001.) *Cf* Greenwich Condominium Ass'n v. Clayton Inv. Corp., 918 S.W.2d 410 (Mo. App. 1996).

In direct contrast, § 210.830 provides that the natural mother, each man presumed to be or alleged to be the natural father “shall” be made parties. This provision is mandatory, however, as it directs that “if not subject to the jurisdiction of the court, [the unavailable party] shall be given notice of the action in a manner prescribed by the court and an opportunity to be heard.” Id. This portion directs a result on failure to act as legislated; the portion of the UPA directing the child be made a party to a paternity declaration does not.

In § 210.830, the legislature did not include a sanction for failure to make the child a party, such as dismissing the paternity action. Because §210.830 fails to include a sanction for the failure to join the child as a party to a paternity

declaration, the statute is directory and not mandatory. Thus, the trial court erred in determining that the child's presence before the trial court was critical to the determination of paternity and then using that determination to find that Mr. LeSage does not have standing to recover for the murder of his unborn son under the wrongful death statute.

Regardless of whether directory or mandatory, the trial court was not free to ignore the analysis mandated by Missouri Rule of Civil Procedure 52.04. "The Rules of Civil Procedure are not merely exhortations from a judicial catechism; nor are they simple suggestions of legal etiquette. Rather they are rules of practice and procedures to promote the orderly administration of justice." Mello v. Williams, 73 S.W.3d 681 (Mo. App. 2002).

Rule 52.04 requires a two-step analysis. Kingsley v. Burack, 536 S.W.2d 7 (Mo. *banc* 1976). Under 52.04(a), the trial court must determine whether Dillon is merely necessary by applying the criteria set out in that subsection. Those criteria define necessary parties as those who are "so vitally interested in the subject matter of the controversy that a valid judgment adjudicating the subject matter cannot be effectively rendered without their presence as parties." In re Estate of Remmele, 853 S.W.2d 476 (Mo. App. 1993). Dillon LeSage does not fit with in the requirements of 52.04(a), as he cannot be interested in the subject matter of the controversy, and his absence from the determination cannot lead to inconsistent judgments. The matter should therefore have proceeded in his absence.

Furthermore, because Dillon LeSage is dead, it is not feasible to join him as



a party. Where joinder is not feasible, Rule 52.04(b) controls. Feinstein v. Feinstein, 778 S.W.2d 253 (Mo. App. 1989).

**(b) Determination by Court Whenever Joinder Not**

**Feasible:**

If a person is described in Rule 52.04(a)(1)...cannot be made a party, the Court **shall** determine whether in equity and good conscience the action should proceed among the parties before it or should be dismissed, the absent party being thus regarded as indispensable.

(Emphasis added.)

The rule then sets out four areas of inquiry to determine whether a party is indispensable to an action:

- (i) to what extent a judgment rendered in the person's absence might be prejudicial to that person or those already parties;
- (ii) the extent to which by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided;
- (iii) whether a judgment rendered in the person's absence will be adequate; and
- (iv) whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

Id.

Save an ethereal interest in not being bastardized, Dillon LeSage has no interest to be protected by his joinder in the paternity motion, and his interests

could not be affected, let alone prejudiced, by his nonjoinder. Conversely, Robert LeSage has no adequate remedy for the wrongful death of his son if the Petition for Determination of Paternity is dismissed for nonjoinder of Dillon, and cannot proceed with his wrongful death lawsuit, contrary to Connor, *supra*.

The trial court's reliance on Richie v. Laususe, 950 S.W.2d 511 (Mo. App. 1997), was misplaced. The issue of the indispensability of the child as a party was not before the court in Richie, which dealt with establishing paternity after the putative **father** had died. The only discussion in Richie concerning indispensability of the child to a paternity determination under the UPA occurs in the opinion of the **dissent** in *dicta*. The question of indispensability is neither supported by the language of the UPA nor germane to the holding Richie.

Dillon Lesage is not *per se* an indispensable party. Nowhere in the Uniform Parentage Act is the word "indispensable" found. Indispensability is only determined through practical application of Rule 52.04. It is undisputed that the trial court did not consider these factors as it was required to under Rule 52.04. The trial court's failure to continue the requisite analysis is an abuse of discretion and, ultimately, a denial of LeSage's right to equal protection. *See* discussion *infra*.

As noted by the trial court, of all of the states adopting the UPA, only Washington has reached the question of an unwed father's right to establish paternity after his child's death and, even then, the court did not consider the question of an unwed father's right to establish paternity of a child who died

before birth. In Gonzales v. Cowen, 884 P.2d 19 (Wash. App. 1994), Trina Gonzales sued for the wrongful death of her four month old son. Carlos Cowen sought half of the wrongful death award, even though he had never seen his son, nor the child's mother from the time she was six months pregnant . Id. at 20.

The Washington Court of Appeals, after noting that Cowen had the opportunity to establish paternity but had failed to do so, held that Cowen could not establish paternity in the absence of his deceased son. Id. at 22. As such, he was not entitled to share in the settlement for his son's wrongful death.

The facts in Gonzales are much less compelling than in the case at bar, however. Cowen never saw nor supported his child, and did not support the child's mother. Robert LeSage was engaged to, and would have been married to Dillon's mother prior to his birth, but for the tragic death of both. Under the UPA, Robert LeSage had no opportunity to declare paternity, whereas Cowen did. In fact, the Washington Court of Appeals noted this lack of action by Cowen in its opinion.

Gonzales is further distinguishable from the case at bar. First, the failure to establish paternity in the case at bar is due to the impossibility of ever joining Dillon LeSage to the paternity action, rather than the mere failure to join Christopher Cowen before his death in Gonzales. Second, the court in Gonzales was not asked to harmonize the UPA with Cowen's Equal Protection rights, or Missouri's Wrongful Death Statute and the cases interpreting it. Finally, the court in Gonzales did not address the analysis required in Missouri when a necessary

party is determined to be unavailable.

Gonzales does not express the law of Missouri, even under similar facts. In Glasco v. Fire and Cas. Ins. Co. , 709 S.W.2d 550 (Mo.App. 1986), the Western District Court of Appeals held that the biological father was entitled share in the proceeds for his child's wrongful death claim, even though he had taken no steps to legitimize the child, support the child or shoulder responsibility for the child. This is consistent with interpretations of Missouri's Wrongful Death statute and Cobb v. State Security Insurance Co., 576 S.W.2d 726 (Mo. *banc* 1979), holding that the right to maintain a wrongful death action for the loss of a child vests in both parents, regardless of marital status. Although Glasco was decided before the enactment of the UPA, it declares the rights of unwed fathers under the wrongful death statute.

While the UPA does not expressly provide for a declaration of paternity after the death of a child, neither does the statute prohibit it. The UPA likewise does not provide for a declaration of paternity in probate settings. *See In the Matter of Nocita*, 914 S.W.2d 358 (Mo. *banc* 1996). In such situations, this Court has previously harmonized the laws of this state, rather than deny a remedy where the statute did not expressly do so.

Rule 52.04 addresses the UPA's omission with a practical approach. The UPA does not provide for a determination of an unwed father's paternity *prior to birth*, and the Missouri Rules of Civil Procedure do not provide for joinder of a fetus to an action, such that an unwed father's paternity could be determined

before birth. Absent analysis under Rule 52.04, then, the UPA does not completely address all paternity issues.

While the primary purpose of the UPA is to protect the interests of the child, where, as here, the child is deceased, the UPA still functions to protect the rights of the parent. LeSage is not able to avail himself of his rights however, absent an analysis under Rule 52.04 and finding that joinder of all parties is not feasible, allowing LeSage to proceed in the absence of Dillon. The trial court's failure to engage in the required analysis requires reversal.

If a posthumous declaration of paternity is not allowed, the notion of the right of an unwed father to proceed for the death of a fetus, declared by this Court in Connor, is unreachable. Rule 52.04, when harmonized with the UPA, provides the solution in this instance, and prevents both negation of Connor's directive and the violation of LeSage's equal protection. Any other result is contrary to the intent and purpose of Missouri's law concerning wrongful death.

## II.

**THE TRIAL COURT VIOLATED ROBERT LESAGE'S RIGHT TO EQUAL PROTECTION AS GUARANTEED BY THE UNITED STATES AND MISSOURI CONSTITUTIONS WHEN IT DENIED MR. LESAGE'S PETITION FOR DETERMINATION OF PATERNITY OF HIS UNBORN CHILD AND SUBSEQUENTLY DISMISSED WITH PREJUDICE MR. LESAGE'S PETITION FOR THE WRONGFUL DEATH OF HIS UNBORN CHILD, FINDING THAT MR. LESAGE LACKED STANDING TO PROCEED UNDER THE MISSOURI WRONGFUL DEATH STATUTE. THIS RESULT TREATS UNWED FATHERS DIFFERENTLY THAN UNWED MOTHERS IN A MANNER PROHIBITED BY THE CONSTITUTIONS OF MISSOURI AND THE UNITED STATES.**

In Cobb vs. State Security Insurance Co., 576 S.W.2d 726 (Mo. *banc* 1979) this Court held that to bar a biological father from bringing a wrongful death suit for the death of his illegitimate child when such a suit would be permitted by the child's mother violates the father's right of equal protection. Cobb noted that the rights of parents to bring suit for the wrongful death of a child vests in both parents, regardless of marital status. Id. at 736. The Court in Cobb relied on Glon v. American Guarantee & Liability Ins. Co., 391 U.S. 73 (1968), in which the United States Supreme Court struck down a Louisiana law that allowed mothers of legitimate children to recover for the wrongful death of a child, but refused recovery for the death of illegitimate children.

Denial of LeSage's Petition for Determination of Paternity without a hearing, followed by dismissal of the underlying wrongful death lawsuit because LeSage had not been declared the father of Dillon denies LeSage equal protection of the law and eviscerates Connor. Such a result allows a suit for wrongful death by the unwed father of an illegitimate fetus only when the mother does not die with her nonviable fetus, whereas the unwed mother of a nonviable fetus would always be able to sue. This unequal treatment of unwed fathers violates the Equal Protection Clauses of both the United States Constitution and the Missouri Constitution. "To recognize the right of the natural mother of an illegitimate child to maintain a wrongful death action but in the same breath to refuse to recognize the corresponding right of the natural father, would violate the equal protection clauses of the state and federal constitutions." Glasco, 709 S.W.2d at 554, *citing Wilcox v. Jones*, 346 S.2d 1037, 1038 (Fla. App. 1977).

It is firmly established that a constitutional question must be presented at the earliest possible moment that good pleading and orderly procedure will admit under the circumstances of the given case, otherwise it will be waived. Callier v. Director of Revenue, 780 S.W.2d 639 (Mo. 1989). The critical question in determining whether waiver occurs is whether the party affected had a reasonable opportunity to raise the unconstitutional act or statute by timely asserting the claim before a court of law. Id; State ex rel. York v. Daugherty, 969 S.W.2d 223 (Mo. 1998). The trial court dismissed this case without hearing evidence, on basis of lack of standing and therefore lack of jurisdiction.

Where, as here, the trial court erroneously declares that it lacks jurisdiction to hear the matter before it, LeSage could not waive a constitutional issue by action or inaction. Id. The trial court, through its misinterpretation of the UPA, perceived a lack of jurisdiction, and this misperception prevented LeSage from raising his equal protection challenge. Such does not constitute a waiver. LeSage's only proper response to a motion to dismiss was to demonstrate that his petition stated a cause of action. It is unreasonable to require all possible challenges to the outcome of a motion to dismiss be raised, rather than simply meeting the dismissal with sufficient allegations to withstand it.

LeSage had no opportunity to make a constitutional challenge in the trial court, as his Petition for Declaration of Paternity was denied in the same opinion which dismissed his wrongful death suit with prejudice. LeSage subsequently raised this denial of equal protection in applications for extraordinary writs and on appeal.

Absent an opportunity to raise a constitutional challenge in the trial court, the failure to do so cannot be viewed as a waiver of the issue and the issue should be deemed preserved. Even so, this Court has authority to determine constitutional issues when the public interest is involved. Id. Declaration and transfer of this matter to this Court by the Missouri Court of Appeals, Eastern District, confirms public interest in the outcome.

If allowed to stand, this ruling will be extrapolated to deem unwed fathers without any rights as to their unborn children, absent agreement and participation



by the child's mother. The UPA was enacted in 1987 to protect the interests of children and parents. Piel v. Piel, 973 S.W.2d 373, 375 (Mo. App. 1996). While the child's interests are paramount, they are not the sole focus of the Act. Further, the UPA is a remedial statute, and is to be liberally construed. State ex rel Ford v. Wenskay, 824 S.W.2d 99 (Mo. App. 1992). As such, it should be construed, where possible, to protect the rights of the father where they are not in conflict with the rights of the child.

Denial of a remedy to Robert LeSage frustrates the dual purpose of the UPA. In stark contrast to this goal, the UPA is being twisted and used by Defendant as a sword to defeat the interests of Dillon's father.

This is contrary to the policy of the UPA, rather than in its furtherance. More importantly, this unequal treatment violates the constitutional rights of unwed fathers by treating them differently than unwed mothers.

### **III.**

**THE TRIAL COURT ERRED IN TREATING DEFENDANT'S MOTION TO DISMISS AS ONE FOR SUMMARY JUDGMENT AND GRANTING DEFENDANT'S MOTION TO DISMISS FOR LACK OF STANDING WHERE PLAINTIFF'S PETITION ALLEGED STANDING. THE TRIAL COURT ACKNOWLEDGED THAT IT RELIED ON FACTS OUTSIDE THE PETITION, THEREBY TREATING SUCH MOTION AS ONE FOR SUMMARY JUDGMENT, WITHOUT AFFORDING PLAINTIFF AN OPPORTUNITY TO RESPOND. FURTHER, THE TRIAL COURT'S DISMISSAL WITH PREJUDICE WAS OVERBROAD AND AN ABUSE OF DISCRETION IN THAT IT BARS ALL CAUSES OF ACTION FOR THE WRONGFUL DEATH OF DILLON LESAGE AGAINST DEFENDANT BY ALL PERSONS, CONTRARY TO THE CLEAR INTENT OF MO. REV. STAT. §537.080, (THE WRONGFUL DEATH STATUTE). THE WRONGFUL DEATH STATUTE ALLOWS FOR SEVERAL CLASSES OF PLAINTIFF, BUT THE TRIAL COURT'S DETERMINATION THAT MR. LESAGE LACKED STANDING AND SUBSEQUENT DISMISSAL WITH PREJUDICE OF THE DEATH CASE WILL INSTEAD SERVE AS A COMPLETE BAR TO ALL SUITS AGAINST DEFENDANT FOR THE WRONGFUL DEATH OF DILLON LESAGE.**

Pursuant to MO. REV STAT. § 537.080 (1986), Robert LeSage brought this

suit for the wrongful death of Dillon, his unborn child. Because Robert was not yet married to the child's mother, Brandi Roussin, at the time Brandi and the child were killed, Robert was not presumed to be Dillon's father by law. Despite the lack of presumption, Robert alleged in his Petition for wrongful death that he was the father of the child. (L.F. at 7, App. Ex. 1). Robert filed a Petition for Determination of Paternity under the UPA. The trial court dismissed the Petition for Determination of Paternity finding that all parties required were not before the court. (L.F. at 34, App. Ex. 3).

Robert again attempted to have the law recognize his paternity by filing an Amended Petition Determination of Paternity accompanied by a Petition for the Appointment of a Next Friend or Plaintiff/Petition *ad Litem* on behalf of Dillon. The UPA provides for representation of a minor child by a Next Friend, and Robert sought to have the trial court treat his unborn son as it would a minor. The Defendant filed a one-line Motion to Dismiss asserting that Robert lacked standing to proceed without his proof of his paternity. (L.F. at 58, App. Ex. 5).

The trial court denied Robert's request to have a Plaintiff/Petition *ad Litem* appointed for Dillon, but did not address Robert's request for the appointment of a Next Friend. Instead, the trial court treated the Motion to Dismiss as one for summary judgment, held that Dillon was a required party to the Determination of Paternity not before the court, and dismissed, with prejudice, Robert's suit for wrongful death based on Robert's lack of standing. (L.F. at 59, App. Ex. 6).

The proper inquiry of a Motion to Dismiss is whether Plaintiff states a

cause of action on the face of the Petition. Arnold v. American Family Mutual Insurance Co., 987 S.W.2d 537 (Mo. App. 1999.) Further, the facts on the face of the Petition are accepted as true. Id., Murphy v. A.A. Mathews, 841 S.W.2d 671 (Mo. *banc* 1992).

The Petition at issue states that Robert is Dillon's father. (L.F. at 7, App. Ex. 1). As the father of Dillon, he is entitled to bring an action for wrongful death. MO. REV. STAT. § 537.080 (1986). Therefore, the Petition alleges sufficient facts on its face to withstand a Motion to Dismiss, and the Motion to Dismiss was improvidently granted.

The trial court relied on Switzer v. Hart, 957 S.W.2d 512 (Mo. App. 1997), for the proposition that "[i]n ruling on a motion to dismiss for lack of standing, the court may look beyond the face of the Petition, consider additional non-contested facts, and engage in a summary judgment mode of analysis." (L.F. at 60, App. Ex. 6).

Switzer does not control as Robert's paternity of Dillon *is* a contested fact. Defendant argues Robert's lack of standing to proceed alleging Robert's lack of paternity of Dillon whereas the Petition alleges that Robert is Dillon's father. This is a contested issue on which the factfinder must consider evidence. The consideration of this evidence goes beyond that which the trial court may consider on a Motion to Dismiss and invokes the principles attendant a Motion for Summary Judgment, as provided for in Missouri Rule of Civil Procedure 55.27(b):

If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 74.04, and all parties shall be given reasonable opportunity to present all materials made pertinent to such a motion by Rule 74.04.

Missouri Rule of Civil Procedure 55.27

The trial court, by treating Defendant's Motion to Dismiss as one for summary judgment without allowing Plaintiff to present evidence violated this rule. Manzer v. Sanchez, 985 S.W.2d 936 (Mo. App. 1999). Before a trial court may treat a Motion to Dismiss as one for summary judgment, the parties must be notified of the court's intention and given the opportunity to present all materials pertinent to a Motion for Summary Judgment. Id. at 939. Rather than hearing evidence on the point, the trial court determined it was without jurisdiction to consider evidence of Robert's paternity, and dismissed the case, even though his Petition stated a cause of action as pleaded.

A motion to dismiss tests the sufficiency of the Petition. The trial court would be within its discretion to also consider additional non-contested facts which all parties accepted as true at the time of the argument on the motion to dismiss. Switzer 957 S.W.2d at 514. While undisputed fact may support such an action, Robert LeSage's lack of paternity of Dillon Lesage **is not such a fact**. The *only* evidence at bar is that Robert LeSage is Dillon's father. It is undisputed only

that Robert LeSage is not *presumed to be the* father of Dillon, but that does not end the inquiry, nor does it deem him **not** Dillon's father.

The court below refused to declare Robert LeSage to be Dillon's father. This ruling was not a declaration that Robert was not Dillon's father, *but rather that the trial court would not determine that he was*. The trial court did not base this ruling on the evidence, but rather the procedural bar it misperceived to exist. The trial court misapprehended this distinction when it determined the lack of paternity to be undisputed, and relied on this determination to support dismissal.

While the trial court ostensibly (albeit improperly) followed a summary judgment standard, the court refused to consider Plaintiff's unrebutted evidence. By doing so, the trial court failed to afford Plaintiff an opportunity to respond to the outside-the-record facts which the trial court considered in dismissing Plaintiff's claim for the wrongful death of Dillon. Furthermore, these facts were considered by the court *sua sponte*, as Defendant's Motion to Dismiss makes no reference to *any* facts.

The trial court's dismissal with prejudice is also overbroad. MO. REV. STAT. § 537.080 (1986) allows only one action against any one Defendant for the death of any one person. A Plaintiff *ad Litem* may be appointed to pursue a wrongful death action pursuant to § 537.080 if no members of Class 1 or 2, i.e. parents or lineal descendants or siblings of the decedent, exist. The trial court's dismissal with prejudice was an abuse of discretion that exceeded her jurisdiction in this matter and forecloses a wrongful death action against Defendant by other

class members or a Plaintiff *ad Litem*. As such, Robert LeSage requests this Court reverse the dismissal with prejudice.

## **CONCLUSION**

For error described in any or all of the Points Relied On and Argument supporting those points, Plaintiff respectfully requests that this Honorable Court reverse the dismissal of this matter or, in the alternative, that the dismissal with prejudice be amended to a dismissal without prejudice, and for such other and further relief as this Court deems reasonable and proper.



Pursuant to Missouri Rule of Civil Procedure 84.06 (c), I certify that this brief complies with the limitation contained in Rule 84.06 (b) and contains 6,666 words.

Respectfully submitted,

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BY \_\_\_\_\_

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**CERTIFICATE OF SERVICE**

A copy of the foregoing was hereby sent via U.S. Mail to the following on  
this 4<sup>th</sup> day of November, 2002:

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## **APPENDIX**

Amended Petition.....Exhibit 1

Petition for Determination of Paternity.....Exhibit 2

Order of Court, October 16, 2001 .....Exhibit 3

Amended Petition for Determination of Paternity.....Exhibit 4

Motion to Dismiss .....Exhibit 5

Order and Judgment, December 3, 2001 .....Exhibit 6